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CASE NOS.:	**2003-LHC-2103**	**2003-LHC-2104**
	2003-LHC-2105	**2003-LHC-2106**
OWCP NOS.:	**1-157729**	**1-156304**
	1-149374	**1-119287**

In the Matter Of:

JAMES D. CHATELL
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer

and

THE LIGHTSHIP GROUP
Employer

and

SIGNAL ADMINISTRATION
Carrier

Appearances:

Scott N. Roberts, Esq., Groton, Connecticut, for the Claimant

Donald E. Wallace, Esq., Macdonald & Wallace, Quincy, Massachusetts
for The Lightship Group and Carrier

Conrad Cutcliffe, Esq., Archetto, Cutcliffe & Glavin, Providence, RI
for Electric Boat Corporation

BEFORE: Colleen A. Geraghty
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim for workers' compensation benefits filed by James Chatell (the "Claimant"), against the employers Electric Boat Corporation ("EB") and The Lightship Group("Lightship" or "Employer") and the Lightship Group's insurance carrier, Signal Administration ("Signal" or the "Carrier"), under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "Act" or "LHWCA").[1] After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me in New London, Connecticut on December 8, 2003, at which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the employer Lightship and its carrier, Signal. The parties offered stipulations, and testimony was heard from the Claimant and from Thomas Alexander, President of Lightship. Documentary evidence was admitted without objection as the Claimant's Exhibits ("CX") 1-8, the Employer's Exhibits ("EX") 1-5 and ALJ Exhibits ("ALJX") 1-18. Hearing Transcript ("TR") 13, 16, 18-19. Briefs were received from the parties and the record is now closed. [2]

II. Parties' Stipulations and Issues Presented

The parties offered the following stipulations: (1) the Claimant suffered an injury to the left arm on January 28, 2002; (2) the injury arose out of and in the course of his employment with Lightship; (3) there was an employer/employee relationship at the time of the left arm injury; (4) the left arm injury claim was timely filed, noticed and controverted; (5) the informal conference was held on June 4, 2003; (6) the Claimant has not returned to his job at Lightship. TR 5-11.

The remaining issues in dispute are: (1) whether the injury claims are within the jurisdiction of the Longshore Act; (2) whether the alleged lung claim is causally related to the Claimant's employment at Lightship; (3) the nature and extent of disability with regard to the left

[1] On November 21, 2003, the Court issued a Decision and Order Granting Electric Boat Corporation's Motion for Summary Decision on the ground that the Claimant and Electric Boat settled all claims the Claimant had against Electric Boat in a settlement approved pursuant to Section 8(i) of the Act by Administrative Law Judge Kennington on July 12, 2002. Electric Boat did not participate further in this proceeding.

[2] Although the case includes four claims, the Court granted EB's Motion for Summary Judgment with regard to two claims for injuries related to the Claimant's employment at EB. The Claimant settled all claims related to his employment at EB. The Claimant filed claims for a foot injury, knee injuries and bilateral carpal tunnel injuries against EB and settled all of these claims in various agreements with EB. TR 67-73, *See* November 21, 2003 Decision and Order Granting Electric Boat Corporation's Motion for Summary Decision entered in this matter.

arm injury and alleged lung condition; (4) whether the Claimant is entitled to medical care; (5) the Claimant's average weekly wage; (6) whether the Employer is entitled to a credit for benefits paid under the State of Rhode Island Workers' Compensation Program. TR 5-12.[3]

III. Findings of Fact and Conclusions of Law

A. Testimony

1. Testimony of the Claimant

Mr. Chatell is sixty-one years old. He left high school in the 11th grade, but subsequently earned a GED. TR 20. After leaving school, the Claimant worked at Valley Ready Mix as a heavy equipment mechanic and drove cement trucks for four years beginning in 1963 or 1964. TR 21. He then drove cement trucks for Cardy Corporation for two to three years, before returning to Valley Ready Mix as a cement truck driver. The Claimant worked at Electric Boat Corporation from 1976-1995, except for a period of one year (1979-1980) when he returned to Valley Ready Mix. TR 22-23. At EB, the Claimant worked as a welder. He initially performed structural welding work, but switched to pipe welding after injuring his feet in 1981, which made it difficult for him to stand for extended periods of time. TR 23-25. In approximately 1993, the Claimant was transferred to work as a heavy equipment operator at EB, operating backhoes, 15 ton forklifts, cranes and tractor trailer trucks.

In 1997, the Claimant began working for ASK Corporation, a predecessor to the Lightship Group at Quonset Point.[4] TR 28. The Claimant testified that he was hired initially as a welder, but soon began performing machinist duties. TR 28-29, 94-95. He explained that Lightship was a large job shop which had contracts to repair many vehicles, machines, or parts. TR 46. He stated that he was welding, operating a lathe and milling machine inside the Lightship Building. TR 34-35. Mr. Chatell testified that occasionally he would be assigned "road trips" which he explained were jobs where the company bid contracts on ships. TR 35. These contract jobs required him to go to the location of a ship to make repairs. TR 35-46. He stated a couple of the road trip jobs took five or six days to complete the ship repairs. TR 36, 39-41. The Claimant also testified that the Lightship Group had a contract to repair Coast Guard Cutters and he stated that he performed some of these repairs on the ships and in the shop at the Lightship facility. TR 45.

Mr. Chatell stated that during the time he was working for ASK, the Company moved to a new building at Quonset Point. He recalled that the move was sometime in 1999. TR 34.

[3] The parties did not stipulate to the timeliness of the claim for injury to the lungs. The notice of injury for the lung claim was filed on February 6, 2003 alleging an injury date of January 28, 2002. CX 2. The claim for compensation was also filed on February 6, 2003. CX 2. However, neither party raised this issue at the hearing or in the posthearing briefs. Issues not addressed by the parties are waived. TR 116.

[4] ASK Company became the Lightship Group in 1998. TR 94-95

Mr. Chatell reported that once Lightship took over operations at the same building where ASK had operated, Lightship blocked all of the welding vents and there was no ventilation in the building. TR 51. The Claimant testified there could be five or six welders working at the same time in a space without ventilation. TR 54. He also stated that the building used a wood stove as the only heat source. TR 51. The Claimant reported that one of the pieces of machinery the Company repaired was diesel generators. He said that after repairs were completed, the generators were started while inside the building and during the winter months this generated diesel smoke that hung in the air halfway down from the ceiling. TR 51, 53. The Claimant reported that this smoke caused coughing and watery eyes, forcing him to leave the building on occasion. TR 51-52. He also reported that paint booths were inside the facility with a good exhaust system, but machines that were too large to fit in the paint booths were painted out in the open in the shop. TR 52.

The Claimant testified that on January 28, 2002 he was inside the Lightship facility repairing a street sweeper owned by the State of Rhode Island when his left elbow was crushed. TR 47. He stated that in the several months immediately preceding his elbow injury he had been working inside the shop repairing snowplows owned by the State. TR 50.

The Claimant also alleges a work-related lung condition, and reported that he began treatment with Dr. Leach for the lung condition in 1995 or 1996. TR 54. He also acknowledged a 30 year smoking history. TR 55. He further testified that he has been welding for many years. He stated that he had breathing difficulties once in a while during the period he worked at EB, but that EB kept the doors open.

B. Testimony of Thomas Alexander

Thomas Alexander is an owner and is also the President of the Lightship Group. TR 94. Mr. Alexander testified that the Lightship Group was formed in November 1998. TR 95. He also explained that the Lightship Group had always occupied its current building at Quonset Point. TR 94-95. He testified that the building or facility the Lightship Group worked out of was approximately 100 by 100 feet.[5] TR 95. Mr. Alexander stated that the building was approximately ¼ mile away from Narragansett Bay. TR 106.

Mr. Alexander agreed that the Claimant performed some welding work, but explained that the Claimant was the company's only machinist and one of only two truck drivers, and thus would be one of the last employees assigned to perform welding work. TR 98. However, he acknowledged that the Claimant did do some welding on some ships. TR 98-99. Mr. Alexander also stated that since the company had moved to the facility, it used a diesel generator once or twice. TR 95, 102. He stated that the employees were moved out of the building before starting up the generator. TR 95, 102.

Mr. Alexander also stated that the Claimant very rarely did any painting and in fact may have spent 1 percent of his time on painting. He explained that the paint shop had separate fan ventilation. TR 101-102. With regard to the air quality inside the building, Mr. Alexander testified that the Occupational Safety and Health Administration (OSHA) has inspected the

[5] It is unclear from the testimony whether the dimensions described were feet or yards.

facility and that OSHA did not issue any citations related to air quality in the building. TR 96-97.

Mr. Alexander testified that the nature of the Lightship Group's business is ship repair and a significant amount of industrial repair work, as the ship repair portion does not generate sufficient business. TR 105-106. He explained that his company was a job shop that did repairs which might require them to create a part. He stated that the work was varied and that the company did not perform the same work over and over like one might expect of a production operation. TR 107. He also acknowledged that the Claimant would machine or make parts that were needed for ship repair. TR 108-110. He stated that ship repair work constituted approximately 30 percent of the Company's business at the time. TR 111. He further stated that of that 30 percent ship repair work, the Claimant was involved in 80 percent of the associated machine shop work. *Id.*

Mr. Alexander explained that the company had a contract with the State of Rhode Island to repair trucks, snowplows, street sweepers and other vehicles. TR 100. He stated that during the summer months, the bulk of his company's work was repairing state vehicles. *Id*. He also stated that in the winter the State brings its summer equipment, such as the street sweeper the Claimant was working on when injured, to the shop for repair. *Id.* He stated that in the several months prior to the Claimant's injury in January he was working in the shop repairing state vehicles. *Id.*

C. Jurisdiction under the Longshore Act

1. General Longshore Act Coverage Principles

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature and not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT)(1 983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that jurisdiction exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id*. In *Perini*, the Supreme Court held that when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under Section 2(3). Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Perini*, 459 U.S. at 323-324. *See also Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996); *Nelson v. Guy F. Atkinson Constr. Co.*, 29 BRBS 39 (1995) *aff'd mem. sub nom. Nelson v. Director, OWCP*, No. 95-70333 (9th Cir. Nov. 13, 1996); *Johnsen v. Orfanos Contractors*, Inc., 25 BRBS 329 (1992).

The situs test limits the geographic coverage of the Act, while the status test is an occupational concept that focuses on the nature of the worker's activities. *Bienvenu v. Texaco*, Inc., 164 F.3d 901 (5th Cir. 1999) (*en banc*).

Generally, the Act only covers a claimant who establishes: (1) that his or her injury occurred upon the navigable waters of the United States, including any dry dock, or that his or her injury occurred on a landward area covered by Section 3(a) and (2) that his or her work is maritime in nature and not specifically excluded by the Act. 33 U.S.C. §§902 (3), 903 (a). Therefore, for coverage to exist, a claimant must satisfy both the "situs" and "status" requirements of the Act. *See generally Perini*, 459 U.S. at 297.

2. Situs Analysis

"The situs test, in sum, is a geographical one, and even though a longshoreman may be performing maritime work, if he is not injured within the land area specified by the statute, he is not covered by the Act." *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 222 (4th Cir. 1998).

The situs test refers to the place where the employee worked or was injured. The definition of situs in the Act includes navigable waters, and "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer" in the shipbuilding process. 33 U.S.C. § 903 (a). In *Textports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), the Fifth Circuit held that while an adjoining area need not be directly contiguous to navigable water, there must be some maritime nexus.

The Claimant contends that he has established that the Lightship Group facility where he worked and was injured is located in a land area "adjoining" the Narragansett Bay and therefore, he has satisfied the requirements of the situs test. Cl. Br. 6-8. In contrast, the Employer asserts that its facility is not located adjacent to navigable water but is ¼ mile from the Narragansett Bay. LS Br. at 21-22. Additionally, the Employer argues that the area is not an area that the Employer uses to load, unload or repair vessels in the water. *Id.*

The Courts and the Benefits Review Board have construed the term "adjoining area" to include land that is not contiguous to the navigable water if the following factors are met:

(1) the suitability of the site for maritime purposes;

(2) the use of adjoining properties;

(3) the proximity to a navigable waterway;

(4) whether or not the site is as close to the waterway as is feasible, given all the circumstances.

Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 141 (9th Cir. 1978); *McCormick v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 207 (1998); *Waugh v. Matt's Enterprises, Inc.*, 33 BRBS 9 (1999); *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) *cert. denied*, 452 U.S. 905 (1981); *Cunningham v. Dir., OWCP*, 377 F. 3d 98, 104-109 (1st Cir. 2004), affg., *Cunningham v. Bath Iron Works Corp*., 37 BRBS 76 (2003). Thus, the

Board has stated that the situs test encompasses both a functional use and geographic proximity component. *Cunningham v. Bath Iron Works Corp*., 37 BRBS at 83.

In the present case, the Lightship Group's facility had been at Quonset Point, Rhode Island since 1998 and operated out of a building located approximately ¼ mile from Narragansett Bay, a navigable waterway. The Claimant testified that the building had previously been used by Electric Boat. He also stated that Senesco, a company that builds barges and has a floating dry dock, was located next to the Lightship Group's facility. TR 47-49. The Claimant's statements in this regard were unchallenged.

I find that the Claimant has established that the facility was physically close to navigable water and that adjoining properties were used for shipbuilding as the building located next to the Lightship Group was occupied by Senesco, a barge building company.[6]

The question of whether the Lightship facility has a maritime nexus is a closer issue. The company President, Mr. Alexander, testified that the nature of Lightship's business was essentially a job shop that performed machine repairs which might require them to create a part. Mr. Alexander stated that a portion of the business involved repair of machines or parts used on ships. He also stated that industrial repair work comprised a larger portion of the business, as the ship repair portion did not generate sufficient business. TR 105-106. The ship repair portion of the business included repairing parts at its shop and then installing the parts on ships that could be located at any one of several ports throughout the New England area. The ship parts were transported by truck from the shop to the specific ships at the various ports and then installed on the ships by Lightship employees, including the Claimant. The Claimant also testified that employees would work next door at Senesco from time to time, where they would weld or install piping or wiring on the barges constructed there. TR 43, 45. The Claimant and Mr. Alexander also testified that Lightship had a contract with the United States Coast Guard, and that one of the Claimant's "road jobs" involved making repairs to Coast Guard Cutters. TR 43, 45, 105**.** The evidence thus demonstrates that Lightship's business included both ship repair and industrial repair.

Although the ship repair portion of the Lightship Group's work is less than half of the business, the ship repair work constitutes a consistent, regular part of the Employer's ongoing operations. In addition, the company's ship repair work entails more than simply machining parts at the shop – it also requires the Lightship's employees to install the parts on ships and to make other ship repairs including welding holes, railings and piping. These activities are sufficient to constitute maritime activity. The Board has held that meeting just one of the *Herron* factors is insufficient to confer coverage but that not every factor must be met for coverage to ensue. *Cunningham*, 37 BRBS at n. 9. Therefore, I find that the Claimant has established that the Lightship facility was physically close to the Narragansett Bay, a navigable waterway, that the adjoining properties were engaged in maritime work, and that to the extent that some of the

[6] The Employer makes reference to the Claimant's testimony that there "were other buildings between the Lightship Group and the water including an Electric Boat Building, an outfit by the name of Tori and a National Guard airport building." Emp. Br. at 5. A careful review of the testimony leads me to conclude that the testimony cited above by the Employer refers to the initial or first building occupied by ASK and does not refer to the second building ASK used and which the Lightship Group took over in 1998. TR 29-31, 33-34. *see also* 94-95.

Employer's business involved ship repair work, it engaged in maritime activity. Accordingly, I find that the Claimant has satisfied the situs requirement.

3. Status Analysis

The status test refers to the position the claimant holds with an employer. Specifically, the status requirement insures that the Act only covers those people who spend at least some of their time in indisputably maritime operations. *Northeast Marine Terminal v. Caputo*, 432 U.S. 249, 273 (1977).

There is no legislative definition of "maritime employment." Cong. Rec. S11623 Sept.20, 1984. As such, this aspect of the act has been left to the courts to define. In *Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989), the Supreme Court held that land-based claimants at a relevant situs, engaged in activity that is an integral or essential part of loading or unloading a vessel, are covered under the LHWCA. The Court also held that workers "who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act" even though they were not performing work essential to the loading process when they were actually injured. *Id.* at 47. In addition, the Court held as a general matter that an employee meets the status requirement if he performs work that is integral to the loading, unloading, constructing, or repairing of vessels. *Chesapeake & Ohio Ry. Co*., 493 U.S. 40. Accordingly, a claimant having been injured over land must demonstrate Section 2(3) activity which was an integral or essential part of loading, unloading, or repairing a vessel in order to satisfy the status test, unless the claimant falls into one of the occupations specified in Section 2(3). *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 811, 27 BRBS 103 (CRT), *reh'g denied*, 8 F.3d 24 (5th Cir. 1994), *cert. denied*, 511 U.S. 1086 (1994); *see also Ferguson v. Southern States Coop.*, 27 BRBS 16 (1993); *Arjona v. Interport Maint. Co., Inc.*, 31 BRBS 86 (1997).

The United States Supreme Court has held that in order for an employee to satisfy the requirement that he be engaged in work that is integral to the loading or repair of ships he must demonstrate that he spends "at least some of his time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273. The Board has held that as long as the employee is engaged in work that is integral to the loading, unloading or repairing of vessels, and as long as those duties are part of an employee's regular duties and are more than episodic, momentary or incidental to non-maritime work, the employee is engaged in maritime employment even if he also has non-maritime duties. *Zeringue v. McDermott, Inc*., 32 BRBS 275, 277 (1998). The First Circuit has held that to be considered "episodic" work must be "discretionary or extraordinary" as opposed to work or duties which are "a regular portion of the overall tasks to which [an employee] could have been assigned." *Levins v. Benefits Review Board*, 724 F.2d 4, 8 (1st Cir. 1984). The fact that an employee who has duties that include both maritime and non-maritime work is injured while performing non-maritime tasks does not preclude a finding that the employee satisfies the "status" requirement for establishing coverage under the Act.

It is undisputed that when he injured his left elbow, the Claimant was repairing a street sweeper owned by the State of Rhode Island under a contract the Lightship Group had with the State. It is also clear that in the months immediately preceding the Claimant's injury he had

worked exclusively repairing State vehicles. However, the record establishes that the Claimant's tasks also involved machining work, repairing or creating parts for ship or industrial repair. The Claimant was also assigned to make repairs or install repaired parts on ships in various ports throughout New England. In addition, the Claimant's duties also included welding work on barges performed under a contract the Employer had with Senesco, a barge construction business located next to the Employer's facility. Lightship President Thomas Alexander testified that because the Claimant was the only machinist and one of only two truck drivers at the company, he was not sent out on "road jobs" to repair ships as often as other workers. However, he acknowledged that the Claimant had repaired ship parts at the shop and had worked on road jobs during which he took the parts and installed them on various ships. Mr. Alexander also acknowledged that the Claimant had worked on repairing a Coast Guard Cutter and on construction of a barge at Senesco. Therefore, ship repair tasks were a part of the regular duties to which the Claimant could be assigned. Moreover, the company President acknowledged that approximately 30 percent of the Lightship Group's business income came from ship repair work and that the Claimant performed 80 percent of the Company's ship repair work. Under these circumstances, I find that the Claimant has met the status requirement as he has established that he was engaged in maritime work.

D. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. 902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C.Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the claimant has invoked the presumption, and the burden of proof shifts to employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Dir., OWCP,* 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). Under the substantial evidence standard, an

employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Dir., OWCP,* 688 F. 2d 862 (1st Cir. 1982).

1. Pulmonary Injury

In the present case, the Claimant alleges an injury to the left elbow and lung disease. At the hearing the parties stipulated that causation was an issue only with regard to the lung condition. TR. 5-11. The Employer did not contest causation with regard to the left elbow injury. TR 17-18. With respect to the alleged lung injury, the Claimant contends that exposure to pulmonary irritants at the Lightship Group aggravated his underlying lung disease and therefore that he has established causation. Cl. Br. 22-25.

The Lightship Group began operations in 1998 and the Claimant has been working at the Lightship Group since its creation. The Claimant testified that he was exposed to welding and paint fumes and diesel exhaust at the Lightship Group facility. On February 10, 2003, the Claimant's primary care physician, Dr. Richard Leach, prepared a letter stating that the Claimant was totally disabled as a result of COPD, emphysema and asthma and that "this is related to his work environment." CX 5 at 1. The Claimant was also evaluated by Stephen Matarese, D.O. on September 11, 2003 on a referral from Dr. Leach. Dr. Matarese concluded that the Claimant has "severe dyspnea, more likely due to obstructive airway disease from prior smoking and also from his prior occupational exposure to dust and particulates." CX 6 at 2. I find that the Claimant has presented evidence showing that working conditions existed which could have aggravated his pulmonary condition. Therefore, the Claimant has successfully invoked the presumption of causation.

The Employer relies upon Dr. Milo Pulde to rebut the presumption. Dr. Pulde examined the Claimant on April 13, 2003. EX 2. With regard to the lung condition, Dr. Pulde diagnosed multifactorial dyspnea as a result of COPD with emphysema from smoking as demonstrated on chest x-ray as early as December 7, 1987, obstructive sleep apnea with possible pulmonary hypertension and cor pulmonale, and obesity-related restrictive lung disease. EX 2 at 12. Dr. Pulde opined that the Claimant's COPD was the result of a long history of tobacco use. His report opines that after reviewing the medical records, the literature related to industrial bronchitis and welding associated pulmonary disorders and the literature relating to differential diagnois of dyspnea there is no evidence that the Claimant's employment at the Lightship caused or contributed to the Claimant's COPD or pulmonary impairment. Dr Pulde explained that the Claimant's principle lung disorder is consistent with tobacco induced COPD caused by the Claimant's 30 to 40 pack year history of smoking, obesity with probable extra-pulmonary restriction, and obesity related sleep apnea. EX 2 at 12-13. Dr. Pulde went through a detailed analysis of the medical literature related to each aspect of the Claimant's lung disease. Dr. Pulde explained that COPD includes chronic bronchitis, emphysema and asthmatic bronchitis. EX 2 at

13. Citing the medical literature, he stated that smoking is the predominant cause of COPD and that COPD is characterized by a "progressive airflow obstruction that is not fully reversible in response to bronchodilators." *Id.* Dr. Pulde noted that the evidence of the Claimant's tobacco consumption was poorly quantified. However, he referenced several notations in the Claimant's medical records to the Claimant's smoking and associated dyspnea and directions from his physician regarding smoking cessation. EX 2 at 14.

Dr. Pulde's report also addressed the impact of the Claimant's obstructive sleep apnea which he explained is a repetitive partial or complete upper airway occlusion during sleep that is accompanied by oxygen desaturation. Sleep apnea is caused by obesity, enlarged tonsils or uvula or other components of physiology in the tissue of the tongue or throat. He noted that the Claimant had surgery in an effort to treat this condition and was advised to use a CPAP machine. The Claimant is unable to tolerate the CPAP machine on a regular basis. Dr. Pulde stated that the Claimant's obesity related sleep apnea contributes to his symptoms of dyspnea on exertion, the development of pulmonary vascular disease and may also have resulted in pulmonary hypertension with cor pulmonale that is contributing to his compromised pulmonary function. EX 2 at 16. Dr. Pulde's report also opines that obesity contributed to extra-pulmonary restriction that compromised his baseline lung function. EX 2 at 19.

Dr. Pulde's report includes a lengthy discussion of welding and the health hazards associated with that activity. He acknowledges that the health hazards associated with exposure to the by-products of welding include fever, upper respiratory irritation, siderosis and photokeratitis. Citing several studies, Dr. Pulde's report states although welders report respiratory symptoms, "'demonstrations of clear defects and pulmonary function attributed to welding have been inconsistent and at present there is limited evidence that welding results in chronic respiratory impairment.'" EX 2 at 20 (citing Ladou, *Occupational and Environmental Medicine* at 434). The report further states that "there is no convincing evidence that exposure to welding fumes causes excess airway obstruction or contributes to [COPD]" and that "prolonged exposure to welding fumes does not cause either significant clinical abnormalities or any impairment of lung function." EX 2 at 20. Dr. Pulde's report also notes that the contribution of workplace exposure to dust to the development of COPD is unproven.

Dr. Pulde's conclusion that the Claimant's COPD was not caused by or aggravated by his work at the Lightship Group from 1997 to 2002 is based upon the fact that the Claimant's tobacco use exceeded 30-40 pack years and that the chest x-rays from December 7 1987 to June 14, 2002 showed tobacco related COPD, indicating that the COPD was present since at least 1987. Dr. Pulde's conclusion is also supported by the fact that the Claimant's history at the Lightship reflected intermittent exposure to dust, fumes, gases and particulates and also that the Claimant wore a respirator when he was welding. Dr. Pulde also noted that the fact that the medical management of the Claimant's pulmonary condition showed that no pulmonary function tests were performed after 1996 supports the impression of the Claimant's treating physician that his lung condition was consistent with tobacco related COPD and his clinical course was typical for non-occupational and tobacco related COPD. EX 2 at 24. I find that Dr. Pulde's opinion that the Claimant's pulmonary condition is not work-related but rather the result of tobacco induced COPD as well as obesity and sleep apnea and that his work did not affect the course of the

COPD is sufficient to rebut the presumption of causation. Therefore, the presumption falls out of the case.

I must now consider all of the evidence in determining whether the Claimant's pulmonary condition was caused or aggravated by his work at the Lightship Group. The Claimant's treating physician's progress notes from 2000 through 2002 indicate the Claimant was treated for respiratory infections and include repeated instructions for the Claimant to stop smoking. CX 5 at 5-9. The Doctor's notes make no reference to the Claimant's working conditions and do not indicate that his working conditions were contributing in any fashion to his lung condition. Then on February 10, 2003, Dr. Leach wrote a five sentence letter directed to "To Whom It May Concern," in which he stated the Claimant "is on total disability for COPD, emphysema and asthma. This is related to his work environment…." CX 5 at 1. However, Dr Leach' letter provides no support or explanation for his bald conclusion that the pulmonary condition is work-related. Moreover, despite several attempts to cajole the Claimant to stop smoking, Dr. Leach's opinion fails to discuss the effect the Claimant's extensive smoking history has on his COPD. Therefore, I give little weight to his opinion that the Claimant's COPD is related to his work environment. Dr. Matarese examined the Claimant and found he had COPD likely from tobacco smoking but also from his prior occupational exposure to dust and particulates. CX 6 at 2. However, as noted above, Dr. Pulde has cited several studies which have concluded that there is no evidence that exposure to welding fumes contributes to COPD and that the contribution of exposure to workplace dust to COPD is unproven. Dr. Matarese does not address the results of these studies.

I have discussed Dr. Pulde's findings and opinion in detail above. He provided a reasoned basis for his conclusion that the Claimant's pulmonary condition was not related to or aggravated by his work based upon his review of the Claimant's medical records, his examination and reference to several medical studies and journals. After considering all of the evidence, I credit Dr. Pulde's opinion over that of Drs. Leach and Matarese as Dr. Pulde's explanation clearly articulated the basis for his opinion and was supported by the Claimant's medical records and the medical literature. Therefore, I find that the Claimant has failed to establish that his pulmonary condition was aggravated by his work at the Lightship Group.

E. Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

1. Nature of Disability - Left Upper Extremity

There are two tests for determining whether a disability is permanent. Under the first test, a Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask,* 17 BRBS at 60. The question of when maximum medical improvement is reached is primarily a question of fact based upon medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). An administrative law judge may rely on a physician's opinion in establishing the date of maximum medical improvement. *Miranda v. Excavation Constr., Inc.,* 13 BRBS 882 (1981). Under the second test, a disability may be considered permanent if the impairment has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir.1968) *cert. denied* 394 U.S. 976 (1969); *Air Am., Inc. v. Dir., OWCP,* 597 F.2d 773, 781-782 (1st Cir. 1979).

The parties asserted at hearing that the nature of the Claimant's disability was in dispute. TR 8-9, 10-11. However, the briefs submitted to the Court by the parties on this issue are confusing. The Claimant appears to argue that he has not reached maximum medical improvement. However, this argument is made in the context of his discussion of the extent of his injury and whether the Employer has established suitable alternate employment or a residual wage earning capacity. Cl. Br. at 21-22. The Employer first asserts that the Claimant has reached maximum medical improvement as of January 2, 2003, but then contends that permanency has not been raised and should not be considered. Emp. Br. at 31, 27. Under the controlling precedent if an employee has reached maximum medical improvement and continues to have a residual disability then the disability is permanent.

The Claimant's treating physician Dr. MacAndrew first saw the Claimant for the work-related crush injury to his left elbow on January 29, 2002. CX 4 at 6. Dr. MacAndrew continued to treat the injury and over the next two months the doctor noted the Claimant had improved elbow range of motion with physical therapy and reduced swelling. CX 4 at 8-12. During the Claimant's April 2002 visit he continued to report numbness. Dr. MacAndrew ordered an EMG test of the upper extremities with particular attention to the ulnar nerve through the elbow. CX 4 at 12. The EMG indicated bilateral ulnar neuropathy. Dr. MacAndrew recommended surgery for decompression of the left ulnar nerve at the elbow and carpal tunnel release on the left upper extremity. CX 4 at 13. The surgery was performed on June 28, 2002. CX 4 at 17-19.

By August 8, 2002 the Claimant reported that his left elbow was much better and he had excellent range of motion in his elbow. EX 4 at 21-22. The Claimant continued to experience some numbness in the fourth finger and Dr. MacAndrew indicated he expected to see continued improvement. *Id*.

At the September 12 visit, Dr. MacAndrew prescribed physical therapy for strengthening and indicated he would work on a functional capacity assessment in determining "parameters for him to return to work." CX 4 at 23. Dr. MacAndrew's notes reflect that the Claimant informed him that he was applying for Social Security Disability for a pulmonary condition and Dr. MacAndrew stated that "[t]his may be an effecting factor." *Id*. At the October 10, 2002 visit Dr. MacAndrew observed continued improvement and diminished numbness. He also notes that the

Claimant is going out on total disability for a lung condition making his return to work "unlikely." CX 4 at 24. Dr. MacAndrew indicated he would assign a permanent impairment rating at the next visit. *Id*.

On December 10, 2002, Dr. MacAndrew observed that the Claimant had range of motion equal on both sides and full flexion and extension equal to the contralateral side. Dr. MacAndrew also measured for muscle atrophy, pinch and grip strength. CX 4 at 25. Dr. MacAndrew's notes reflect that he intended to review the results of the tests he took with the AMA Guides to Permanent Impairment. *Id*. At this visit, Dr. MacAndrew also stated that he was going to permit the Claimant to return to work. *Id*. Dr. MacAndrew's completed a work status form indicating the Claimant could return to full duty on January 2, 2003. CX 4 at 42. Dr. MacAndrew reported that he would check the Claimant in six weeks' time to assess how the transition back to work went with the understanding that the Claimant was "also a candidate for SSI based upon his pulmonary status." CX 4 at 25.

On January 2, 2003 Dr. MacAndrew saw the Claimant. His notes state that the Claimant is scheduled to return to work and that the Claimant is at maximum medical improvement. CX 4 at 26. Dr. MacAndrew's records indicate that the Claimant doesn't think he can go back to work, and therefore, the doctor states he will check the Claimant in two weeks to see how he has done. Based upon the Claimant's statements, Dr. MacAndrew completed a work status form keeping the Claimant out of work until January 23, 2003. CX 4 at 42. Dr. MacAndrew's notes also reflect that he recommended to the Claimant that he talk with his attorney about returning to work. Dr. MacAndrew sent the impairment rating he assessed for the left arm injury to the Claimant's attorney. CX 4 at 26.[7]

Dr. MacAndrew next saw the Claimant on February 27, 2003. CX 4 at 27. He notes that he had tried to get the Claimant back to work and he was having some problems with his arm. The Claimant informed Dr. MacAndrew that he was on disability at that point and that he had been terminated from his employment. *Id*. As a result, Dr. MacAndrew's progress notes indicate that returning the Claimant to work is a moot point and he understands that some type of settlement agreement is being discussed at this point. *Id.* The physical examination that day showed intact strength, no evidence of wasting but with some numbness in the fourth and fifth fingers of the left hand. *Id*. Dr. MacAndrew completed a work status form indicating that the Claimant may return to full duty as far as his left arm injury was concerned. *Id.* at 43.

On April 7, 2003, Dr. MacAndrew noted complaints of numbness in the last two digits. CX 4 at 28. On examination he observed no focal tenderness to the cubital area or skin changes or suggestion of reflex sympathetic dystrophy. *Id*. Dr. MacAndrew ordered another EMG based upon continued reports of numbness in the fingers. *Id*. Dr. MacAndrew again completed a work status form indicating that the Claimant could return to full duty. CX 4 at 43.

Dr. MacAndrew saw the Claimant on May 19, 2003. CX 4 at 29-30. The results of the Claimant's EMG tests indicate that he has evidence of bilateral distal median neuropathies

[7] According to Dr. Pulde's review of the Claimant's medical records, Dr. MacAndrew assessed a 7 percent permanent impairment of the left upper extremity and a 4 percent impairment of the whole person on January 23, 2003. EX 2 at 7; *see also*, EX 3 at 2.

consistent with bilateral CTS and that the results show a progression of CTS on both sides with the left worse than the right. CX 4 at 29. Dr. MacAndrew was puzzled by this because he had performed surgery in June 2002 to release both the ulnar nerve and the median nerve for CTS on the Claimant's left upper extremity. *Id*. In addition, he noted that the Claimant had not suffered a crush injury to the right arm and yet the CTS had progressed on the right side as well. *Id*. Nevertheless, Dr. MacAndrew stated that the crush injury to the Claimant's left arm was in part contributing to the current CTS and "is responsible for his ongoing complaints." CX 4 at 30. Dr. MacAndrew indicated he would consult with Dr. L-Europa, who did the EMG, and look at other causes for the condition reflected on the EMG tests. *Id*. Dr. MacAndrew filled out a work status form indicating the Claimant was out of work until June 23, 2003. CX 4 at 44.

During the July 17, 2003 visit, Dr. MacAndrew opined that the crush injury to the left arm has contributed to the Claimant's ongoing symptoms, but he also noted that the Claimant has similar symptoms in the right upper extremity and that the upper extremity was not involved in any traumatic injury. CX 4 at 31. Dr. MacAndrew suggests that he may need to redo surgery on the left ulnar nerve, but he wanted to investigate other possible causes for the Claimant's symptoms first and therefore he ordered a cervical MRI. CX 4 at 31-32.[8]

The Claimant acknowledged on cross-examination that he had carpal tunnel syndrome during the period of time he worked for EB. TR 81.

Upon evaluating the evidence, I find that Dr. MacAndrew opined that the Claimant reached maximum medical improvement after the traumatic crush injury on January 2, 2003. By that point he had regained almost full use of the left elbow. Dr. MacAndrew released the Claimant to return to full duty at that point, but he also noted that the Claimant was pursuing social security disability for a pulmonary condition and he recognized that the lung condition may impact the Claimant's return to work. A few months thereafter, after additional EMG tests, Dr. MacAndrew concluded that the Claimant had bilateral CTS. He attributed the CTS on the left, in part, to the traumatic injury to the Claimant's left arm and stated the Claimant could not return to work. However, Dr. MacAndrew does not explain why he attributes the Claimant's left upper extremity neuropathy or carpal tunnel syndrome to the traumatic injury. Dr. MacAndrew's opinion is undermined by the fact that the EMG test indicates that the Claimant's CTS is bilateral and the Claimant did not experience a traumatic injury to the right upper extremity, which might explain the right CTS. In addition, the Claimant testified and the medical records establish that the Claimant's upper extremity neuropathies and CTS predate the traumatic injury, and the Claimant filed claims for bilateral CTS against his previous employer, EB. In that instance, he was assessed a permanent impairment and he settled the claims with EB. CX 7 and 8. Of note in this regard is the fact that the Claimant was found to have "very severe damage to the ulnar nerve at the [left] elbow" in February 2001, well before the crush injury. CX 7 at 3. Despite this left ulnar nerve damage which was evident in February 2001, the Claimant continued to perform his duties at the Lightship Group without restriction until the crush injury to the left elbow on January 28, 2002. On balance, after considering all of the

[8] No progress notes from Dr. MacAndrew after July 2003 were submitted. However, two letter from Dr. MacAndrew to a John Harnett, an attorney, were submitted. CX 4 at 33-35. Those letters report that because of the unusual findings he asked Dr. Europa to re-evaluate the Claimant to rule out any cervical spine contribution to the Claimant's condition.

evidence, I find that the Claimant reached maximum medical improvement from the effects of the traumatic injury to his left elbow by January 2, 2003, when Dr. MacAndrew concluded he had reached maximum medical improvement, cleared the Claimant to return to full duty work and assessed a 7 percent permanent impairment of the left upper extremity as a result of the crush injury. I further find that the Claimant's current bilateral carpal tunnel syndrome and related left ulnar neuropathy cannot reasonably be attributed to the January 28, 2002 crush injury to the Claimant's left elbow as these conditions pre-existed the crush injury.

2. Extent of Disability

With regard to the extent of the injury, the Claimant seeks total disability pursuant to Section 8(a) of the Act as a result of the Claimant's January 28, 2002 left elbow injury. Cl. Br. at 15-16, 19-22**.** A three-part test is employed to determine whether a claimant is entitled to an award of total disability compensation: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals of the same age, experience and education as the employee which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *Am. Stevedores v. Salzano* 538 F.2d 933 (2nd Cir. 1976); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991); *Air Am., Inc. v. Dir. OWCP*, 597 F.2d 773 (1st Cir. 1979); (*Legrow*), *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir.1981).

As discussed above, after the traumatic injury to the left elbow the Claimant's treating physician released him to return to full duty on January 2, 2003. The Claimant did not return at that time because he was disabled as a result of an unrelated pulmonary condition. Some months later, Dr. MacAndrew altered his opinion that the Claimant could return to work as he determined that the EMG results showed the Claimant had bilateral CTS and he recommended a repeat of the surgery he had performed in June 2002. The Claimant has not shown that the CTS was caused by the traumatic injury to his left elbow. Nor has he established that the injury to his left elbow aggravated his CTS. Dr. MacAndrew stated that after surgery the Claimant's CTS worsened on both his left and right upper extremities and that the Claimant did not have a traumatic injury to his right upper extremity which might account for the worsening of CTS in the right upper extremity. Additionally, it is evident from the record that as early as June 2000 and certainly by February 2001 the Claimant had bilateral upper extremity neuropathies, including damage to the left ulnar nerve and bilateral carpal tunnel syndrome, which was worse on the left than on the right upper extremity. CX 7; CX 8 at 5-6. The medical records from Dr. MacAndrew reflect that the Claimant significantly recovered from the crush injury to his left elbow and was cleared to return to work in early 2003 with a 7 percent permanent impairment. Dr. MacAndrew's medical records further indicate that the Claimant's current feelings of numbness in the fourth and fifth fingers of his left hand are the result of bilateral CTS.[9] Based

[9] Additionally, as noted tests showed the Claimant had "very severe damage to the ulnar nerve at the [left] elbow" in February 2001. CX 7 at 3.

on this evidence, I cannot find that the Claimant's inability to return to his work at Lightship is the result of the left crush injury. It is more likely the result of CTS and the non-work-related pulmonary impairment.[10] Therefore, I find that the Claimant has failed to establish a *prima facie* case of total disability by showing that he cannot perform his former job because of a job-related injury. Accordingly, the Claimant has not shown that his disability is total. Therefore, I find that the Claimant's disability is partial.

F. Medical Care

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. §907(a); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). I have determined that the crush injury to the Claimant's left elbow was related to his work at the Lightship Group. The Claimant is, therefore, entitled to medical care for the left elbow crush injury. The Claimant has not submitted evidence showing that there are any outstanding medical bills for treatment he received for his left elbow injury.

The dispute appears to concern coverage for additional left upper extremity surgery recommended by Dr. MacAndrew in July 2003. I have concluded that the Claimant's current bilateral upper extremity neuropathy and CTS was not caused or aggravated by the traumatic injury to the Claimant's left elbow while at the Lightship Group. Therefore, the Claimant is not entitled to medical care for this condition as it is unrelated to the left crush injury.

G. Average Weekly Wage

The Claimant argues that his average weekly wage is $737.64 based upon the wages he earned in the forty eight weeks he worked in the year 2001 ($35, 406.75 ÷ 48 = $737.64). Cl. Br. at 17; EX 4. Although he does not identify which statutory provision he uses, it appears that the Claimant is relying on Section 10(a) and 10(d)(1) to calculate his average weekly wage by dividing his annual wages in calendar year 2001 by the number of weeks worked in that same calendar year. In contrast, the Employer contends that the average weekly wage ought to be determined by applying Section 10(d)(1) of the Act. Emp. Br. at 25. Applying this formula the Employer argues that the wages the Claimant earned in the twelve months preceding his injury ($38, 228.75) are divided by 52 weeks to arrive at an average weekly wage of $735.17.

Section 10 of the Act provides three methods for calculating a claimant's average annual earnings which are then divided by 52 under Section 10(d)(1) to determine an average weekly wage.[11] Section 10(a) applies to an employee who "shall have worked in the employment in

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[10] The Claimant may be able to bring claim for CTS against Lightship for any increase in his CTS since his employment at EB and for the difference in the permanency rating he previously received for CTS, but he did not bring a claim for CTS in the present case and presented no evidence on this. In addition, there is no permanent impairment rating for CTS based upon his work at the Lightship Group.

[11] Section 10(d)(1) is not a separate method for calculating average weekly wage. Rather Section 10(d) directs that average annual wages calculated under either Section 10(a), 10(b) or 10(c) are to be divided by 52 to arrive at an average weekly wage.

which he was working at the time of the injury, whether for the same employer or another employer, during substantially the whole of the year immediately preceding his injury." *Mulcare v. E.C. Ernst, Inc.* 18 BRBS 158 (1987). The average annual earning shall under Section 10(a) shall consist of "two hundred sixty times the average daily wage or salary for a five day worker…." In the present case, no evidence regarding the number of hours the Claimant worked was presented. Therefore, I cannot determine the Claimant's average daily wage as required in performing the calculations under section 10(a).

Section 10 (b) is inapplicable as it applies to injured employees who worked in permanent or continuous employment but did not work for "substantially the whole of the year" prior to the injury. In the present matter, the evidence shows that the Claimant worked fulltime in the year preceding his left arm injury and therefore, Section 10(b) does not apply.

Section 10(c) is employed when a claimant's average weekly wage can not be determined under Sections 10(a) or (b). The objective of Section 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991); *Wayland v. Moore Dr Dock*, 25 BRBS 53, 59 (1991). Section 10(c) can be used where there is insufficient evidence to calculate an average daily wage under either Sections (a) or (b). *Todd Shipyards Corp. v. Dir., OWCP,* 545 F.2d 1176 (9th Cir. 1976); *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

The difference in the parties' calculations of the Claimant's average weekly wage result from the fact that the Claimant includes only the wages he earned in calendar year 2001 where it appears he worked only 48 weeks and does not include the wages he earned in the first four weeks of calendar year 2002 immediately preceding his injury. In contrast, the Employer includes the wages the Claimant earned in the year (12 months) immediately preceding his January 28, 2002 injury, or the wages the Claimant earned from February 2001 through his injury on January 28, 2002 divided by 52. Upon consideration, I find that counting the Claimant's earnings in the year (12 months) immediately preceding his January 2002 injury accurately reflects his annual wage-earning capacity at the time of his injury. Accordingly, I find that in the year prior to his injury date, a period of twelve months beginning in February 2001 and extending to the date of injury in late January 2002, the Claimant's annual earnings totaled $38, 228.75, which when divided by 52 results in an average weekly wage of $735.17.

H. Compensation Due

Based on the foregoing findings, the Claimant is owed temporary total disability compensation pursuant to Section 8(b) of the Act, 33 U.S.C. 908(b), from January 28, 2002 until January 3, 2003, the date he reached maximum medical improvement, at a rate of 66 2/3 percent of his average weekly wage of $735.17. The Claimant is also entitled to permanent partial disability compensation benefits for a 7 percent permanent partial disability under Section 8(c) of the Act , 33 U.S.C. § 908(c)(1), based upon a rate of 66 2/3 percent of the average weekly wage of $735.17 beginning on January 4, 2003 for a period of 21.84 weeks.

I. Employer's Entitlement to Credit

The parties agree that the Employer has been paying the Claimant compensation benefits for the left elbow crush injury under the State of Rhode Island's workers' compensation program. TR 6-7. Pursuant to Section 3(e) an employer is entitled to a credit for benefits paid for the same injury under any other workers compensation law. Therefore, the Lightship Group is entitled to a credit for compensation benefits as well as permanent loss of function benefits and a disfigurement benefit paid by the State of Rhode Island for the left arm injury of January 2002. *D'Errico v. General Dynamics Corp.*, 996 F.2d 503 (1st Cir. 1993).

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, The Lightship Group, and its Carrier, Signal Administration, shall pay to the Claimant, James D. Chatell, temporary total disability compensation pursuant to 33 U.S.C. § 908(b) of the Act from January 28, 2002 to January 3, 2003 at a rate of 66 2/3 percent of the average weekly wage of $735.17;

2. The Employer shall pay the Claimant seven percent permanent partial disability compensation pursuant to 33 U.S.C. § 908(c)(a) based upon at a rate of 66 2/3 per cent of the average weekly wage of $735.17 beginning on January 4, 2003 for a period of 21.84 weeks;

3. The Employer is entitled to a credit pursuant to 33 U.S.C. § 903(e) for all amounts previously paid for the left arm injury under the State of Rhode Island's workers' compensation program;

4. The Claimant's attorney shall file, within 30 days of receipt of this Decision and Order, a fully supported and fully itemized fee petition pursuant to 20 C.F.R. § 702.132(a), sending a copy thereof to counsel for the Employer and carrier, who shall then have fifteen (15) days to file any objections; and

5. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts